

2666A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ANY COMBINATION OF AN INTOXICANT AND ANY OTHER DRUG TO A DEGREE THAT RENDERS HIM OR HER INCAPABLE OF SAFELY DRIVING – § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway¹ while under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle² on a highway.³

[“Drive” means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]⁴

[“Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]⁵

2. The defendant was under the combined influence of an intoxicant and (name of drug) to a degree which rendered (him) (her) incapable of safely driving at the

time the defendant (drove) (operated) a motor vehicle.⁷

[(Name of drug) is a drug.]⁸

Definition of “Under the Influence”

“Under the influence” means that the defendant’s ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and any other drug.⁹

[Not every person who has consumed alcoholic beverages and any other drug is “under the influence” as that term is used here.]¹⁰ What must be established is that the person has consumed a sufficient amount of alcohol or of any other drug or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.¹¹

[The law states that the alcohol concentration in a defendant’s (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant’s alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100

milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concertation test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED¹² AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"¹³ THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING
MAY BE ADDED:¹⁴

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2666A was approved by the Committee in 2019. This revision was approved by the Committee in December 2021; it added suggested language concerning test results showing 0.08 grams or more in the defendant's blood.

This instruction is for a criminal offense under § 346.63(1)(a), involving the combined influence of an intoxicant and any other drug. For offenses involving operating under the influence of a drug alone, see Wis JI-Criminal 2666. For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and a controlled substance or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

If liquor shares the influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where the intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.
2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.
3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.
4. This is the definition of "drive" provided in § 346.63(3)(a).
5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.
6. The Committee suggests that the name of the drug, if known, be used throughout the instruction. Section 340.01(15mm) provides that for the purpose of the Vehicle Code, "drug" has the meaning specific in § 450.01(10).

This instruction assumes that the identity of the drug is known. If the identity of the drug is not known, proving that a drug is involved may be extremely difficult in light of the statutory definition of "drug" that applies. Section 340.01(15mm) provides that the applicable definition is the one found in § 450.01(10), which reads as follows:

"Drug" means:

- (a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;
- (b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or animals;
- (c) Any substance other than a device or food intended to affect the structure or any function of the body or persons or other animals; or
- (d) Any substance intended for use as a component if any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

7. The statute requires not only operating while "under the influence" but also that the defendant be

under the influence “to a degree which renders him or her incapable of safely driving.” The “incapable of safely driving” requirement appears to be more restrictive than the “ability to operate is impaired” standard that is part of the uniform definition of “under the influence.” See, for example, Wis JI-Criminal 2663. Since this requirement of the statute supersedes the usual “under the influence” definition, no definition is included in the instruction.

See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. The Committee concluded that it adds clarity to refer to the name of the alleged drug, if known. See note 6, *supra*. Whether the defendant was actually under the combined influence of an intoxicant and the drug named remains a jury question.

9. This definition of “under the influence” is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of a drugs which are roughly similar in their effect on a person as alcohol. That is, a person could use some drug in a limited degree and, like the person who consumes a limited amount of alcohol, not be “under the influence” as that term is used here.

Some drugs, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range “is relevant evidence on intoxication . . . but is not to be given any prima facie effect.”

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the “blood alcohol curve,” see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., C.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.